Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

CHRISTIE LEE LITTLETON,
Petitioner,

v.

DR. MARK A. PRANGE,
Respondent.

On Petition for Writ of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The denial of the petition for discretionary review and the motion for rehearing by the Supreme Court of Texas, leaving the opinion of the Fourth Court of Appeals District of Texas intact, presents fundamental statutory and constitutional issues concerning the Full Faith and Credit provisions of Article IV, § 1, and, the equal protection clause of Amendment XIV, of the Constitution of the United States.

1. Whether Texas violated the Full Faith and Credit clause of Art. IV, § 1, in voiding a transsexual's constitutionally protected, private and intimate marital relationship, as a member of her medically assigned genital sex to a person of the opposite genital sex, without a compelling and sufficient state interest or proper governmental objective.

2. Whether the Equal Protection clause of Amendment XIV, applies equally to all women, including those who medical professionals identify as women, at birth or later, and, consequently, to all heterosexual marriages, regardless of whether the parties' genitals were present at birth or medically formed.

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PETITION FOR WRIT OF CERTIORARI

Christie Lee Littleton (hereinafter, "Mrs. Littleton") petitions for a writ of certiorari to review the decision of the Fourth Court of Appeals District of Texas, Opinion, having been denied discretionary review by the Texas Supreme Court.

OPINIONS BELOW

The opinion of the Fourth Court of Appeals (App. C 1 – 25) is reported at 9 S.W.3d 223 (Tex. App., 1999). The denial of discretionary review by the Texas Supreme Court (App. A 1) is reported at 10 S.W.3d No.2, SCTOL-4 (Tex., Mar. 14, 2000). The order denying motion for rehearing of the petition for review by the Texas Supreme Court (App. B 1) is reported at 15 S.W.3d No.2, SCTOL-2 (Tex., May 30, 2000).

JURISDICTION

The order denying discretionary review was entered by the Texas Supreme Court on March 2, 2000. (App. A 1.) The judgment of the Fourth Court of Appeals was entered on October 27, 1999. (App. C 1-25.) A motion for rehearing was timely filed with the Texas Supreme Court on April 18, 2000, which motion was denied on May 18, 2000. (App. B 1.) Petitioner states that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, to review this petition for certiorari.

CONSTITUTIONAL PROVISIONS

1. ARTICLE IV, Section 1, of the United States Constitution provides in pertinent part:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

2. AMENDMENT IX of the United States Constitution provides in pertinent part:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. AMENDMENT XIV, Section 1, of the United States Constitution provides in pertinent part:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the right of transsexuals to have their state sanctioned marriages recognized in a sister state when the transsexual changes state residence. It also involves a fundamental conflict among the states regarding the transsexual's right and ability to marry.

Specifically, the broad fundamental question is whether a legal marriage contract entered into in one state shall be given Full Faith and Credit by all sister states. Flowing from that question are two equally important

questions. First, whether a transsexual is entitled to have her legal sex conform with the sex recognized by medical professionals, defined as the medically confirmed genital sex of the post-operative status, or, as the sex stated on an original birth record. And, second, whether the constitutionally protected right to marry extends to transsexuals.

As a constitutional matter, this case presents to this Court its first opportunity to answer the questions of whether the protections afforded to both men and women under all the laws of our country apply equally to transsexual men and transsexual women, and settling divergent, and often opposing, decisions among several states, as well as the federal courts. In so doing, this case presents this Court with the opportunity to define what is a "male" and what is a "female."

The constitutional issues of full faith and credit and equal protection, as applied to the States by Amendment XIV, were first raised following the issuance of the written opinion of the Court of Appeals, Fourth District, 9 S.W.3d 223 (Tex. App., 1999) (App. C 1-25), where the appellate court issued an opinion and ruling that used criteria, including religious belief, supposition, and the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996) rather than address the stipulated evidence and entire body of case law on this subject.

The Petitioner addressed these issues in the petition for discretionary review and motion for rehearing before the Supreme Court of Texas.

STATEMENT OF THE FACTS

Christie Lee (Cavazos) Littleton legally married Jonathan Mark Littleton[1] in Kentucky on December 31, 1989. On July 29, 1996, Mr. Littleton died as the result of alleged medical malpractice by Dr. Mark A. Prange. Mrs. Littleton, along with the decedent's mother and the decedent's children by a previous marriage, filed suit for the wrongful death of Mrs. Littleton's husband against Dr. Prange.

In the course of discovery, Dr. Prange's counsel became aware that Mrs. Littleton's birth certificate stated, "Lee V. Cavazos, Jr., a male, born March 29, 1952." Mrs. Littleton freely disclosed that in 1977, she had petitioned a local Texas District Court for a legal change of name from Lee V. Cavazos, Jr. to Christie Lee Cavazos. She also freely disclosed that in 1979, she had undergone corrective genital reassignment surgery.

In 1980, following the final stage of her corrective surgery, she applied for and Texas government officials issued a State of Texas, Department of Public Safety Identification Card, which indicated "SEX: F[emale]." The identification card application was supported by appropriate documentation, including the Texas District Court's Order changing the Petitioner's name and a sworn medical affidavit from her physician-surgeon (who had been salaried in part by the State of Texas).

The State of Texas, Department of Public Safety Identification Card was secured without any fraud: all parties

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[1] Since the early filings with Mrs. Littleton's previous counsel, her husband's first name has been repeatedly misspelled and all prior documents and court opinions have continued that misspelling. As her new counsel, we wish to respect the memory of Mr. Littleton, and have used the correct spelling of his first name throughout this Petition.

(the Court, the Department's clerks and supervisors, and the physician-surgeon) were aware of everything about Mrs. Littleton's past, her transition, and her medical corrective genital reassignment surgery.

In 1988, Mrs. Littleton temporarily moved to Kentucky at which time she met Jonathan Mark Littleton. Using as identification her State of Texas, Department of Public Safety Identification Card, she and Jonathan Mark Littleton applied for and obtained a Kentucky marriage license, indicating she as "bride" and he as "groom," and were legally married in Kentucky. Shortly, thereafter, the Littletons moved to Texas.

During the course of their six and one-half year marriage, the Littleton's, as many married couples, engaged in private, intimate, heterosexual vaginal-penile[2] sexual intercourse. They also filed federal income taxes as husband and wife, walked hand in hand along San Antonio's Riverwalk, enjoyed each other's companionship and company, and, were known in the community as husband and wife. They lived and loved, happily together, as husband and wife, until Jonathan Mark Littleton's untimely death in 1996.

Following discovery of Mrs. Littleton's medical past, Dr. Prange's counsel moved the trial court for and was granted a Partial Summary Judgment And Order Of Severance and a Modified Final Partial Summary Judgment And Order against Mrs. Littleton, alone.

The trial court did not take testimony. However, the parties had stipulated and submitted to two medical

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[2] We apologize for what may seem overly graphic language, however, to accurately discuss the legal implications in this case on transsexuals and the intersexed, we cannot avoid using the correct medical terminology.

affidavits, both stating that Mrs. Littleton "is medically a female." *Littleton* at 232 (App. C 22).

The court ignored the medical evidence and Mrs. Littleton's amended birth certificate and dismissed Mrs. Littleton's cause of action based solely on the fact that her original birth certificate stated she was a male.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

This Court should grant this petition for several reasons.

TEXAS VIOLATED THE FULL FAITH AND CREDIT CLAUSE OF ART. IV, § 1, IN VOIDING A TRANSSEXUAL'S CONSTITUTIONALLY PROTECTED, PRIVATE AND INTIMATE MARITAL RELATIONSHIP, AS A MEMBER OF HER MEDICALLY ASSIGNED GENITAL SEX TO A PERSON OF THE OPPOSITE GENITAL SEX, WITHOUT A COMPELLING AND SUFFICIENT STATE INTEREST OR PROPER GOVERNMENTAL OBJECTIVE.

Under the Constitution, Article IV, § 1, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Texas court's decision to refuse to recognize acts and public records of the Commonwealth of Kentucky, in the form of the validity of a marriage, violates the Full Faith and Credit clause. The Full Faith and Credit clause "implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887).

By invalidating the Littleton's marriage, Texas failed to give Full Faith and Credit to the Acts, Records, and Proceedings of a sister state, the Commonwealth of Kentucky, and its own Acts, Records, and judicial Proceedings which were properly recognized in Kentucky. In this case, Texas not only participated in the direct funding and services, including psychological and medical, needed for Mrs. Littleton, to correct and alter her genital sex from male to female (Acts), but, additionally, approved and issued a State of Texas, Department of Public Safety Identification Card (Records), based upon two documents. The first document is a court order changing her name (judicial Proceeding). The second document is a sworn affidavit from her physician-surgeon indicating completion of corrective genital reassignment surgery. The analysis contained in the majority opinion of the Texas Court of Appeals invalidating the Kentucky marriage, failed to look at either the underlying Texas acts, records, and judicial proceedings, given Full Faith and Credit by the Commonwealth of Kentucky, or the human being before it.

The Littleton's *heterosexual* marriage was converted into a "same-sex" marriage only for the purpose of denying a transsexual female the right to seek redress for the death of her spouse at the hands of his physician.[3] The record does not contain any evidence that, at the time of the marriage, the Petitioner was anything but female. In fact, by stipulation, the record contains two affidavits stating that Christie Lee Littleton was medically a female.[4]

In contrast to the *Littleton* case, where corrective genital reassignment surgery completed the transition, the

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[3] In fact, Dr. Prange settled with the remaining parties to the suit, brought by Mrs. Littleton, for an undisclosed sum following the court issuing summary judgment against Mrs. Littleton.

[4] Presumably from the date she completed the corrective genital reassignment surgery.

case of *B. v. B.*, 78 Misc.2d 112, 335 N.Y.S.2d 712 (1974), presented the opposite case of a female to male transsexual who had undergone a hysterectomy and mastectomy but had not had a phalloplasty, the deciding fact upon which the New York court used to determine that where a male lacks the ability to perform sexually as a male, no valid marriage could exist. The constitutional difficultly presented in *B. v. B.* is that of equal protection (discussed below). For example, a male who is injured, suffers from erectile dysfunction, or has had surgery (orchiectomy) related to testicular cancer, is medically no different than a female-to-male transsexual, who, for economic reasons, is unable to afford expensive phalloplasty. Both appear to the public as males, with beards, muscles, and a deepened voice.

To define maleness as the ability to penetrate and femaleness as the ability to procreate is antiquated, not to mention incomplete and inherently unjust.

THE EQUAL PROTECTION CLAUSE OF AMENDMENT XIV, APPLIES EQUALLY TO ALL WOMEN, INCLUDING THOSE WHO MEDICAL PROFESSIONALS IDENTIFY AS WOMEN, AT BIRTH OR LATER, AND TO THEIR HETEROSEXUAL MARRIAGES, REGARDLESS OF WHETHER THE PARTIES' GENITALS WERE PRESENT AT BIRTH OR MEDICALLY FORMED.

The trial and appellate courts chose to ignore the only evidence in the record, and chose to base their decisions on religious beliefs. Justice Hardberger states in the second opening paragraph of the Opinion in *Littleton*, at 223 (App. C 2),

> ***"The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a***

person's gender immutably fixed by our Creator at birth?" [Emphasis added.]

The above reference to a higher authority is the same rationale that had been used by racists and other bigots to justify segregation based on color, to justify hate crimes, and to justify discriminatory practices, and each was ultimately rejected by this Court as being Constitutionally prohibited, for example:

> *"Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."*

This pronouncement by the trial judge in *Loving v. Virginia*, 388 U.S. 1, 3 (1967), ultimately led to this Court's decision prohibiting anti-miscegenation statutes.

Next, the Court of Appeals of Texas, Fourth District, after ignoring the stipulated medical evidence, imposed its own "test" based on postulated genetic chromosome information.[5] Yet, neither Mrs. Littleton nor her deceased husband ever had a chromosome test. Thus, by granting and upholding Summary Judgment based on the aforementioned non-testing, and by assuming that the deceased Mr. Littleton was XY and Mrs. Littleton is *also* XY, the lower courts are requiring Mrs. Littleton to test herself and reveal that information in violation of Texas statutory public policy.

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[5] Based on unknown facts, as stated in *Jay v. Boyd*, 351 U.S. 345, 367 (1956), "No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country."

Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), which prohibits (with exceptions for which this case does not factually qualify) the use of genetic information by a "(8) State agency," defined to include the "judicial branch of state government."

Contrary to both Justice Hardberger's statement, *Littleton*, at 230 (App. C 14), and Justice Angelini's concurring opinion, *Id.*, at 231 (App. C 18), that the Texas Legislature has not spoken, the Texas Legislature has spoken on the confidentiality of genetic testing. First in Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), and then in Tex. Lab. Code Ann. § 21.402 – 21.403 (Vernon 1999) (prohibiting discrimination in employment based on genetic information). It may be of interest to this Court that the American Medical Association has spoken on the confidentiality of genetic testing. (See, AMA Code of Medical Ethics, Code of Medical Ethics, §§ 2.132, 2.135, 2.137, 5.08, and, 5.09 (1996-97). Texas does not have a statute requiring chromosomal testing as a prerequisite to marriage, nor does any other state.

Curiously, though not in the instant record, when it suited the purpose of the State of Texas, the Attorney General of Texas forced Mrs. Littleton, as the wife of Mr. Littleton in a community property state, to pay child support for Mr. Littleton's children from a prior marriage, even when he was ill and unemployed, as indicated on the Form 1040, jointly filed by the Littletons with the Internal Revenue Service.[6]

Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. *Hirabayashi v United States*, 320 U.S. 81, 100 (1943). Yet, as pointed out by the dissent in *Littleton*,

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[6] The IRS accepted eight joint Form 1040 filings for the six and one half year marriage.

> "While a birth certificate would ordinarily establish a person's gender conclusively, Christie presented significant controverting evidence that indicated she was female. This evidence was so substantial that it raised a genuine issue of material fact about whether she was Jonathon's surviving spouse. In an ordinary summary judgment case, such controverting evidence would prevent this court from concluding that the movant had met its burden on a motion for summary judgment. But in this rather extraordinary case, *the majority has determined that there are no significant facts that need to be determined* and concluded that Christie is a male as a matter of law. *Despite this conclusion, there is no law to serve as the basis of this conclusion.*" [Emphasis added.]

Littleton, at 232. (App. C 22.)

A. Conflicting State And Federal Decisions

Texas' treatment of transsexuals as being capable of marriage for child support purposes, but declaring those same marriages void for estate purposes or wrongful death causes is contradictory and patently discriminatory. In this fact pattern the state has asserted one individual is female and the wife for collection of child support, and allowed a private litigant to claim that the same individual is male to prevent the wife from asserting her rights as the survivor of her husband.

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering

Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male. The ability of Mrs. Littleton and many other transsexuals to freely travel, including travel without risk due to their sex status (e.g., which bathroom she may legally use), and to move and reside in many parts of this country is in question.

This case presents this Court with the opportunity to again correct and unify the path being traveled by the States with regard to the rights of citizens who are transsexuals, just as this Court has done for those individuals who have been subject to discrimination based on the classifications of race, sex, national origin, ethnicity, and religion.

There is no provision in any law, act, statute or ordinance in this land that abolishes or removes the rights of individuals to constitutionally protected freedoms if they choose to alter their being, in this case, by lawful, partially state-publicly funded, corrective genital reassignment surgery aimed at presenting a congruent self. This includes statutes that address the issue of gender transition more specifically than those of Texas, including that of Kentucky, the state in which the Littletons' marriage took place. *See* Ky. Rev. Stat. Ann. § 213.121 (5) (1999). Also significantly, neither the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996), nor any of its State counterparts, addresses the situation of a marriage involving a transsexual.

The only prior decision by this Court involving a transsexual was the case of *Farmer v. Brennan*, 511 U.S. 825 (1994), a unanimous decision (with concurring opinions). In *Farmer*, a pre-operative transsexual, who had undergone estrogen therapy, breast implants, and an "unsuccessful" orchiectomy, had been subject to discriminatory practices

within the federal prison system. This Court remanded the matter to the lower courts instructing them to appropriately consider the transsexual's complaint.

Several jurisdictions in this country have addressed the problem posed by the facts of the *Littleton* case. For example, in *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975), a U.S. District Court held that there was "no state interest . . . whatsoever" in the arbitrary refusal to grant state recognition of a transsexual's "current sexual status."

In Ohio, a trial court published an opinion in the case *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828, 832 (Ohio Probate Court, 1987), a declaratory judgment action in which the court decided that a post-operative transsexual female (born in Ohio) was not allowed to marry a male (because Ohio does not have a law allowing amendment to birth records).

In New Jersey, the state Supreme Court, in the case *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204 (1976), upheld a marriage, between a transsexual female and a male, in awarding support and maintenance upon divorce.

Interpretation of the exact same fact pattern and Texas statutes at issue in the instant state case resulted in an opposite federal ruling in *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, VAOPGCPREC 15-90, 05-25-90 8-23 Marriage 7-2 Med. Treat-Repro. Function Vet. Aff. Op. Gen. Couns. Prec. 15-90, 1990 WL 605201 (D.V.A.),[7] holding:

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[7] In this case arising in Houston, Texas, the relevant facts before the Veteran's Administration included: transition in 1977, surgery in 1985, name change order in 1986, marriage in 1987, V.A. claim filed in 1988, Order to amend birth cert. 3/9/89, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 5/10/89, appellate decision in 1990.

"Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran's spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse."

B. Recent International Decisions

Justice Thomas recognized in his concurring opinion in *Farmer*, that, "evolving standards of decency * * * mark the progress of a maturing society." *Ibid.*, at 859 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Evolution has not escaped the English case of *Corbett v. Corbett*, 2 All E.R.1 33 (P. 1970), (a reported trial level opinion which decided that for the purpose of marriage, chromosomes are dispositive and thus determine one's sex).

Many jurisdictions, around the world, that had previously followed the analysis in *Corbett*, Id., have evolved to expressly, and some forcefully, repudiate Judge Ormrod's inflexible edict. For example, as stated in an Australian repudiation,

"Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and

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For comparison Mrs. Littleton's facts: transition about 1965, name change order in 1977, surgery in 1979, marriage in 1989, wrongful death law suit filed in 1997, Order to amend birth certificate in 8/7/98, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 8/14/98, appellate decision in 1999.

the external genitalia of which, as a result of irreversible surgery, they no longer have.

* * *

"Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society . . .."

Secretary, Dept. of Social Security v. S.R.A. (1993) 118 A.L.R. 467, 472, 493 (Fed. Ct. Gen. Div. Australia).

In New Zealand, in *Attorney-General v. Otahuhu Family Court*, (1994) 1 NZLR 603, 607, "If society allows such persons to undergo therapy and surgery in order to fulfil that [the desire to alter their genital sex] desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry."

The Court of Justice of the European Communities, continuing the momentum against the *Corbett* philosophy, in an appeal of Case C-13/94, *P. v S. and Cornwall County Council*, a case originating in England, issued a Judgment Of The Court on April 30, 1996, stating in part, at paragraph 7, "Under English law [referring to *Corbett*], P. [who is a male-to-female transsexual] is still deemed to be male." Then, in overriding England's assertion, this highest European Court stated,

"21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex

to which he or she was deemed to belong before undergoing gender reassignment.

"22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

C. Equal protection includes all women.

The marital relationship, held as a right so basic and fundamental and so deeply-rooted in our society, while not mentioned specifically in the Constitution, has been determined, in a concurring opinion of this Court, to be one of those unenumerated rights within the Amendment IX. *Griswold v. Connecticut*, 381 U.S. 479, 488, 491, 492, 499, 502 (1965). Additionally, this fundamental right is protected under the Amendment XIV, due process clause. *Loving, supra*, at 12; *Griswold, supra*, at 486; *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978).

Under cases beginning with *Griswold v. Connecticut*, 81 U.S. 479 (1965), and heightened by *Roe v. Wade*, 410 U.S. 113 (1973), a fundamental right, such as marriage, carries with it the burden on government that any restraint be justified under a "compelling state interest" analysis. Further, following *United States v. Virginia*, 518 U.S. 515, 533 (1996), this Court directed the focus of a reviewing court to determine whether the state's justification is "exceedingly persuasive."

Marriage is an economic partnership, *Kahn v. Kahn*, 801 F. Supp. 1237 (S.D.N.Y., 1992), or a civil contract between parties, *Fornshill v. Murray*, 1 Bland 479 (1828), and procreation is not a requirement.

Therefore, in regard to the ability to marry, there must be a compelling state interest to justify discriminating between a female who has had a complete hysterectomy (removal of uterus and ovaries) and is hormonally supported by hormone replacement therapy (HRT), and, a female who's vagina was surgically created and who is hormonally supported by HRT, or, for that matter, a female who has been in a serious automobile accident, and who has had pelvic reconstruction, including a neo-vagina.

The *Littleton* court failed to apply either a compelling state interest" or an "exceedingly persuasive justification" analysis for declaring Mrs. Littleton a male and voiding her Constitutionally protected Kentucky marriage under Texas law.

D. Birth Record Amendments, Corrections, & Prohibitions.

The Texas legislature has not passed any statute on the issue of a transsexual amending a birth record. However, "a number of other states have determined that transsexuals who have undergone corrective genital reassignment surgery are entitled to amend their official documents to indicate their self-identified sex."[8] *See, e.g.*, Ala. Code §22-9A-19 (1997); Ariz. Rev. Stat. Ann. § 36-326(a) (4) (West 1993); Cal. Health & Safety Code §§103,430, 103,425 (West 1997); Colo. Rev. Stat. Ann. § 25-2-115(4) (1990); D.C. Code Ann. § 6-217 (d) (1995); Ga. Code Ann. § 31-10-23(e) (Harrison 1998); 10 Guam Gov't. Code § 3222 (1998); Haw. Rev. Stat. § 338-7.7 (1993); 410 Ill Comp. Stat. Ann. § 535-17 (West 1997); Iowa Code Ann. § 144.23.3 (1997); La. Rev. Stat. Ann §40:62 (West 1992); Md. Health-Gen. I Code Ann., § 4-214 (Lexis 1995); Mass. Gen. Laws Ann. Ch. 46 § 13 (West 1993); Mich. Comp. Laws § 333.2891 (1998); Miss. Code

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[8] Greenberg, Julie A., *When Is A Man A Man, And When Is A Woman A Woman?*, __ FLA. L. REV. __ (Sept. 2000).

Ann. 41-57-21 (1998); Mo. Ann. Stat § 193.215(9) (West Supp. 1999); N.M. Stat. Ann. § 24-14-25 (D) (Michie 1997); N.C. Gen. Stat. § 130A-118(b)(4) (1997); Or Rev. Stat § 432.235 (4) (1997); Utah Code Ann. § 26-2-11 (Supp. 1998); Wis. Stat. Ann. § 69.15 (West 1990).

Tennessee specifically prohibits changes to birth records based upon corrective genital reassignment surgery. Tenn. Code Ann. § 68-3-203(d) (1996).

Whether or not Mrs. Littleton's birth certificate indicated "male" or "female" at the time of her marriage is not relevant, or, stated in its best light, placing form over substance. The fact remains that at the time she married Jonathan Mark Littleton, Mrs. Littleton was female, both physically and mentally, and legally. Since neither Texas nor Kentucky require presentation of a birth certificate as a prerequisite for obtaining a marriage license, and require only a state issued identification,[9] the marriage was legal and entitled to be given Full Faith and Credit by the Texas courts, and Mrs. Littleton was entitled to the protections afforded by the equal protection clause of Amendment XIV.

E. Impact of this Case, Nationally.

As mentioned in the statement of the case, an equally important question is whether the constitutionally protected right to marry extends to transsexuals, and if so, whether, as,

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[9] Tex. Fam. Code Ann. § 2.005 (b) (West 1999), states: "**The proof must be established by a** certified copy of the applicant's birth certificate or by some certificate, license, or **document issued by this state**, the United States, or a foreign government." [Emphasis added.] Ky. Rev. Stat. Ann. § 400.100 (5)(b) (West 1999), states: "Vital information for each party, including full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current residence, relationship to other party, full names of parents. " [No statutorily required identification.]

either the *male to female* bride versus groom, or, the *female to male* groom versus bride.

Christie Lee Littleton was a bride for six and one-half years, and was a widow for another three years until the Texas Court of Appeals converted her heterosexual marriage into a "same-sex" marriage, then voided it, and, made her only eligible for marriage as a *male to female* groom.

Contrast this case to the Veteran's Affairs Opinion, *supra*, the *female to male* groom in that federal ruling was sensibly allowed to remain a groom, and, the Texas marriage to his female bride was allowed to stand.

The resolution of this issue has a direct effect on the tens-of-thousands of persons who are transsexuals, the millions of people who are intersexed,[10] and the millions of people who transsexuals and the intersexed have married or seek to marry. While the exact incidence of transsexuality and intersexuality are unknown, some estimates indicate that between 3,000 and 10,000 transsexuals have undergone hormonal and corrective genital reassignment surgery and live in the United States. Another 30,000 to 60,000 people consider themselves candidates. *See* David W. Meyers, *The Human Body and the Law*, 221 (2d ed. 1990). Although the exact incidence of intersexuality is uncertain, the intersexed constitute between one-tenth of one percent and

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[10] The intersexed are those humans who have chromosome patterns other than XX or XY. For example, XYY, XYYY, XO, XXY, XXXY and any other of the numerous combinations currently identified. Most intersexed individuals initially do not know that they are intersexed, especially those who are older adults, for whom testing was not available, or, those who are younger adults, who have had no outward physical manifestations, medical, or reproductive fertility problems, and, those who are children, who are under the care and control of their parents. *See*, Greenberg, J., *Defining Male and Female: Intersexuality and Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

four percent of the population. *See*: Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are not Enough*, SCIENCES, Mar.-Apr. 1993, at 20-21; Alice D. Dreger, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX at 43 (1998).

A number of cases addressing the rights of transsexuals are in various stages of litigation. For instance, in Kansas, a male-to-female post-operative transsexual's right to inherit from her husband's estate is on appeal. In California a post-operative male-to-female transsexual married a female in England. Her employer, the Los Angeles fire department, contested the validity of her marriage (the case recently settled). In New Hampshire, the U.S. Postal service is refusing to acknowledge a male-to-female transsexual's right to be treated as a female. Finally, in Vermont, a male-to-female transsexual forced the state to issue a license to marry a woman because the state had refused to amend her birth certificate to read "female" (resulting in a legal, but socially appearing same sex marriage).

Contrary to Justice Hardberger's statement in *Littleton*, that, "Christie is medically termed a transsexual, ***a term not often heard on the streets of Texas***, nor in its courtrooms," [Emphasis added.] *Id.*, at 225 (App. C 5), in the past four decades since Renee Richards sued to establish her rights to play tennis professionally (*Richards v. U. S. Tennis Ass'n*, 93 Misc.2d 713, 400 N.Y.S.2d 267 (1977)) the media have repeatedly put transgendered topics before the public.[11]

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[11] Public issues involving transsexuals and the intersexed is evident from the following sampling: *The Washington Post* (Jun 2000); *The Washington City Paper* (Sep 1999); *Esquire Magazine* (Apr 1995); news shows such as Good Morning America, A&E Investigative Reports; television talk shows like Donahue and Oprah; sitcoms like Night Court,

The *Richards* court, in analyzing the criteria to determine ones sex, stated, "However, it [referring to chromosomes] is not and should not be the sole criterion, where as here, the circumstances [clear anatomical and psychological evidence of femaleness] warrant consideration of other factors." *Ibid.*, at 721.

F. Defense of Marriage Act (DOMA) Issue

Applying DOMA, 28 U.S.C.A. §1738C (1996), to the *Littleton* case is tantamount to applying an *ex post facto* law in a criminal case. In *Littleton*, both the marriage and Jonathan Mark Littleton's death occurred before DOMA was enacted. In the *Littleton* decision, *supra*, at 226 (App. C 5), Justice Hardberger justified voiding a marriage under the public policy law enacted to protect states from having to give Full Faith and Credit to "same-sex" marriages entered into in sister states. By applying DOMA to a heterosexual marriage he first had to find Mrs. Littleton to be male to convert it into a prohibited marriage.

However, the courts and legislatures making the determination that "same-sex" marriages are illegal were considering gay and lesbian marriages. They were not considering marriages involving post-operative transsexuals. Adding transsexuals into the marital equation makes identifying "same-sex" marriages more theoretically problematic, but not insurmountable. The present public policy of promoting only heterosexual marriages becomes

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The Drew Carey Show, Becker, and Will & Grace, and drama, including Picket Fences, Chicago Hope, and Judging Amy; in addition motion pictures dealing with transgender issues include "Some Like It Hot," "Victor/Victoria," "La Cage aux Fax" and "Birdcage," "Rocky Horror Picture Show," "Tootsie," "To Wong Foo, Thanks for Everything, Julie Newmar" and recently, "Boys Don't Cry" and "The Brandon Teena Story."

upset when the society views a transsexual's heterosexual appearing marriage under a microscope (looking at issues other than the presentation of the couple).

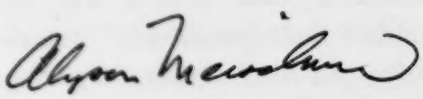
> ***"Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes."*** *Littleton*, at 223 (App. C 1).

CONCLUSION

Maintaining an orderly society is a lawful objective of government. Important issues of Full Faith and Credit of lawful marriages, equal protection for transsexuals, and the conflicting decisions among several states and federal authorities as to the status of transsexuals regarding marriage have reached this Court for decision and guidance.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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Appendix A

THE SUPREME COURT OF TEXAS

Orders Pronounced March 2, 2000

ORDERS ON PETITIONS FOR REVIEW

THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

* * *

99-1214 CHRISTIE LEE LITTLETON, individually and next heir of JONATHON MARK LITTLETON, deceased v. DR. MARK A. PRANGE; from Bexar County; 4th district (04-99-00010-CV, ___ SW3D ___, 10-27-99)

as amended

* * *

Appendix B

THE SUPREME COURT OF TEXAS

Orders Pronounced May 18, 2000

ORDERS ON MOTIONS

THE FOLLOWING MOTIONS FOR REHEARING OF PETITIONS FOR REVIEW ARE OVERRULED:

* * *

99-1214 CHRISTIE LEE LITTLETON, individually and next heir of JONATHON MARK LITTLETON, deceased v. DR. MARK A. PRANGE; from Bexar County; 4th district (04-99-00010-CV, 9 SW3d 223, 10-27-99)

* * *

Appendix C

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

OPINION

No. 04-99-00010-CV

Christie Lee LITTLETON, Individually and
as Next Heir of Jonathon Mark Littleton,
Appellant

v.

Dr. Mark PRANGE,
Appellee

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 98-CI-15220
Honorable Frank Montalvo, Judge Presiding

Opinion by: Phil Hardberger, Chief Justice
Concurring opinion by: Karen Angelini, Justice
Dissenting opinion by: Alma L. López, Justice

Sitting: Phil Hardberger, Chief Justice
Alma L. López, Justice
Karen Angelini, Justice

Delivered and Filed: October 27, 1999

AFFIRMED

This case involves the most basic of questions. When is a man a man, and when is a woman a woman? Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no

clothes. These are observations that each of us makes early in life and, in most cases, continue to have more than a passing interest in for the rest of our lives. It is one of the more pleasant mysteries.

The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a person's gender immutably fixed by our Creator at birth? The answer to that question has definite legal implications that present themselves in this case involving a person named Christie Lee Littleton.

Factual Background

A complete stipulation of the facts was made by the parties in this case.

Christie is a transsexual. She was born in San Antonio in 1952, a physically healthy male, and named after her father, Lee Cavazos. At birth, she was named Lee Cavazos, Jr. (Throughout this opinion Christie will be referred to as "She." This is for grammatical simplicity's sake, and out of respect for the litigant, who wishes to be called "Christie," and referred to as "she." It has no legal implications.)

At birth, Christie had the normal male genitalia: penis, scrotum and testicles. Problems with her sexual identity developed early though. Christie testified that she considered herself female from the time she was three or four years old, the contrary physical evidence notwithstanding. Her distressed parents took her to a physician, who prescribed male hormones. These were taken, but were ineffective. Christie sought successfully to be excused from sports and physical education because of her embarrassment over changing clothes in front of the other boys.

By the time she was 17 years old, Christie was searching for a physician who would perform sex reassignment surgery. At 23, she enrolled in a program at the University of Texas Health Science Center that would lead to a sex reassignment operation. For four years Christie

underwent psychological and psychiatric treatment by a number of physicians, some of whom testified in this case.

On August 31, 1977, Christie's name was legally changed to Christie Lee Cavazos. Under doctor's orders, Christie also began receiving various treatments and female hormones. Between November of 1979 and February of 1980, Christie underwent three surgical procedures, which culminated in a complete sex reassignment. Christie's penis, scrotum and testicles were surgically removed, and a vagina and labia were constructed. Christie additionally underwent breast construction surgery.

Dr. Donald Greer, a board certified plastic surgeon, served as a member of the gender dysphoria team at UTHSC in San Antonio, Texas during the time in question. Dr. Paul Mohl, a board certified psychiatrist, also served as a member of the same gender dysphoria team. Both participated in the evaluation and treatment of Christie. The gender dysphoria team was a mutli-disciplinary team that met regularly to interview and care for transsexual patients.

The parties stipulated that Dr. Greer and Dr. Mohl would testify that their background, training, education and experience is consistent with that reflected in their curriculum vitaes, which were attached to their respective affidavits in Christie's response to the motions for summary judgment. In addition, Dr. Greer and Dr. Mohl would testify that the definition of a transsexual is someone whose physical anatomy does not correspond to their sense of being or their sense of gender, and that medical science has not been able to identify the exact cause of this condition, but it is in medical probability a combination of neuro-biological, genetic and neonatal environmental factors. Dr. Greer and Dr. Mohl would further testify that in arriving at a diagnosis of transsexualism in Christie, the program at UTHSC was guided by the guidelines established by the Johns Hopkins Group and that, based on these guidelines, Christie was diagnosed psychologically and psychiatrically as a genuine male to female transsexual. Dr. Greer and Dr. Mohl also

would testify that true male to female transsexuals are, in their opinion, psychologically and psychiatrically female before and after the sex reassignment surgery, and that Christie is a true male to female transsexual.

On or about November 5, 1979, Dr. Greer served as a principal member of the surgical team that performed the sex reassignment surgery on Christie. In Dr. Greer's opinion, the anatomical and genital features of Christie, following that surgery, are such that she has the capacity to function sexually as a female. Both Dr. Greer and Dr. Mohl would testify that, in their opinions, following the successful completion of Christie's participation in UTHSC's gender dysphoria program, Christie is medically a woman.

Christie married a man by the name of Jonathon Mark Littleton in Kentucky in 1989, and she lived with him until his death in 1996. Christie filed a medical malpractice suit under the Texas Wrongful Death and Survival Statute in her capacity as Jonathon's surviving spouse. The sued doctor, appellee here, filed a motion for summary judgment. The motion challenged Christie's status as a proper wrongful death beneficiary, asserting that Christie is a man and cannot be the surviving spouse of another man.

The trial court agreed and granted the summary judgment. The summary judgment notes that the trial court considered the summary judgment evidence, the stipulation, and the argument of counsel. In addition to the stipulation, Christie's affidavit was attached to her response to the motion for summary judgment. In her affidavit, Christie states that Jonathon was fully aware of her background and the fact that she had undergone sex reassignment surgery.

The Legal Issue

Can there be a valid marriage between a man and a person born as a man, but surgically altered to have the physical characteristics of a woman?

Overview of Issue

This is a case of first impression in Texas. The underlying statutory law is simple enough. Texas (and

Kentucky, for that matter), like most other states, does not permit marriages between persons of the same sex. See Tex. Fam. Code Ann. § 2.001(b) (Vernon 1998); Ky. Rev. Stat. Ann. §402.020 (1)(d) (Banks-Baldwin 1999). In order to have standing to sue under the wrongful death and survival statues, Christie must be Jonathon's surviving spouse. Tex. Civ. Prac. & Rem. Code Ann. §§ 71.004, 71.021 (Vernon 1977). The defendant's summary judgment burden was to prove she is not the surviving spouse. Referring to the statutory law, though, does not resolve the issue. This court, as did the trial court below, must answer this question: Is Christie a man or a woman? There is no dispute that Christie and Jonathon went through a ceremonial marriage ritual. If Christie is a woman, she may bring this action. If Christie is a man, she may not.

Christie is medically termed a transsexual, a term not often heard on the streets of Texas, nor in its courtrooms. If we look at other states or even other countries to see how they treat marriages of transsexuals, we get little help. Only a handful of other states, or foreign countries, have even considered the case of the transsexual. The opposition to same-sex marriages, on the other hand, is very wide spread. Only one state has ever ruled in favor of same-sex marriage: Hawaii, in the case of Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). All other cases soundly reject the concept of same-sex marriages. See, e.g., Dean v. District of Columbia, 653 A.2d 307 (D.C.1995); Jones v. Hallahan, 501 S.W.2d 588 (Ky.1973); Baker v. Nelson, 191 N.W.2d 185 (Minn.1971), aff'd, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974). Congress has even passed the Defense of Marriage Act (DOMA), just in case a state decides to recognize same-sex marriages.

DOMA defines marriage for federal purposes as a "legal union between one man and one woman," and provides that no state "shall be required to give effect to any public act, record, or judicial proceeding of any other state respecting a relationship between persons of the same sex

that is treated as a marriage under the laws of such other State...or a right or claim arising from such relationship." Defense of Marriage Act, Pub. L. No. 104-109, § 2(a), 110 Stat.2419 (1996) (codified as amended at 28 U.S.C.A.§ 1738C (West Supp.1997). So even if one state were to recognize same-sex marriages it would not need to be recognized in any other state, and probably would not be. Marriage is tightly defined in the United States: "a legal union between one man and one woman." See id. § 3(a).

Public antipathy toward same-sex marriages notwithstanding, the question remains: is a transsexual still the same sex after a sex-reassignment operation as before the operation? A transsexual, such as Christie, does not consider herself a homosexual because she does not consider herself a man. Her self-identity, from childhood, has been as a woman. Since her various operations, she does not have the outward physical characteristics of a man either. Through the intervention of surgery and drugs, Christie appears to be a woman. In her mind, she has corrected her physical features to line up with her true gender.

"Although transgenderism is often conflated with homosexuality, the characteristic, which defines transgenderism, is not sexual orientation, but sexual identity. Transgenderism describes people who experience a separation between their gender and their biological/anatomical sex." Mary Coombs, Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage, 8 UCLA Women's L.J. 219, 237 (1998).

Nor should a transsexual be confused with a transvestite, who is simply a man who attains some sexual satisfaction from wearing women's clothes. Christie does not consider herself a man wearing women's clothes; she considers herself a woman wearing women's clothes. She has been surgically and chemically altered to be a woman. She has officially changed her name and her birth certificate to reflect her new status. But the question remains whether the law will take note of these changes and treat her as if she had

been born a female. To answer this question, we consider the law of those jurisdictions who have previously decided it.

Case Law

The English case of Corbett v. Corbett, 2 All E.R. 33 (P.1970), appears to be the first case to consider the issue, and is routinely cited in later cases, including those cases from the United States. April Ashley, like Christie Littleton, was born a male, and like Christie, had undergone a sex-reassignment operation. Id. at 35-36. April later married Arthur Corbett. Id. at 39. Arthur subsequently asked for a nullification of the marriage based upon the fact that April was a man, and the marriage had never been consummated. Id. at 34. April resisted the nullification of her marriage, asserting that the reason the marriage had not been consummated was the fault of her husband, not her. Id. at 34-35. She said she was ready, willing, and able to consummate the marriage. Id.

Arthur testified that he was "mesmerised" by April upon meeting her, and he dated her for three years before their marriage. Id. at 37. He said that she "looked like a woman, dressed like a woman and acted like a woman." Id. at 38. Arthur and April eventually married, but they were never successful in having sexual relations. Id. at 39. Several doctors testified in the case, as they did in the current case. See id. at 41.

Based upon the doctors' testimony, the court came up with four criteria for assessing the sexual identity of an individual. These are:

(1) Chromosomal factors;
(2) Gonadal factors (i.e., presence or absence of testes or ovaries);
(3) Genital factors (including internal sex organs); and
(4) Psychological factors.

Id. at 44.

Chromosomes are the structures on which the genes are carried which, in turn, are the mechanism by which hereditary characteristics are transmitted from parents to offspring. See id. at 44. An individual normally has 23 pairs of chromosomes in his or her body cells; one of each pair being derived from each parent. See id. One pair of chromosomes is known to determine an individual's sex. See id. The English court stated that "[T]he biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex." Id. at 47. The court then reasoned that since marriage is essentially a relationship between man and woman, the validity of the marriage depends on whether April is, or is not, a woman. Id. at 48. The court held that the criteria for answering this question must be biological and, having so held, found that April, a transsexual, "is not a woman for the purposes of marriage but is a biological male and has been so since birth," and, therefore, the marriage between Arthur and April was void. Id. at 48-49. The court specifically rejected the contention that individuals could "assign" their own sex by their own volition, or by means of an operation. Id. at 49. In short, once a man, always a man.

The year after Corbett was decided in England, a case involving the validity of a marriage in which one of the partners was transsexual appeared in a United States court. This was the case of Anonymous v. Anonymous, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971).

This New York case had a connection with Texas. The marriage ceremony of the transsexual occurred in Belton, while the plaintiff was stationed at Fort Hood. Id. at 499. The purpose of the suit was to declare that no marriage could legally have taken place. Id. The court pointed out that this was not an annulment of a marriage because a marriage contract must be between a man and a woman. Id. at 501. If

the ceremony itself was a nullity, there would be no marriage to annul, but the court would simply declare that no marriage could legally have taken place. Id. The court had no difficulty in doing so, holding: "The law makes no provision for a 'marriage' between persons of the same sex. Marriage is and always has been a contract between a man and a woman." Id. at 500.

Factually, the New York case was less complicated than Corbett, and the instant case, because there had been no sexual change operation, and the "wife" still had normal male organs. Id. at 499. The plaintiff made this unpleasant discovery on his wedding night. Id. The husband in Anonymous was unaware that he was marrying a transsexual. Id. In both Corbett and the instant case, the husband was fully aware of the true state of affairs, and accepted it. In fact, in the instant case, Christie and her husband were married for seven years, and, according to the testimony, had normal sexual relations. This is a much longer period of time than any of the other reported cases.

The next reported transsexual case came from New Jersey. This is the only United States case to uphold the validity of a transsexual marriage. In M.T. v. J.T., 140 N.J.Super. 77, 355 A.2d 204, 205 (1976), a transsexual wife brought an action for support and maintenance growing out of her marriage. The husband interposed a defense that his wife was male, and that their marriage was void (and therefore he owed nothing). Id. M.T., the wife, testified she was born a male, but she always considered herself a female. Id. M.T. dated men all her life. Id. After M.T. met her husband-to-be, J.T., they decided that M.T. would have an operation so she could "be physically a woman." Id.

In 1971, M.T. had an operation where her male organs were removed and a vagina was constructed. Id. J.T. paid for the operation, and the couple were married the next year. Id. M.T. and J.T. lived as husband and wife and had sexual intercourse. Id. J.T. supported M.T. for over two years; however, in 1974, J.T. left the home, and his support

of M.T. ceased. Id. The lawsuit for maintenance and support followed.

The doctor who had performed the sex-reassignment operation testified. Id. at 205-06. He described a transsexual as a person who has "a great discrepancy between the physical genital anatomy and the person's sense of self-identity as a male or as a female." Id. at 205. The doctor defined gender identity as "a sense, a total sense of self as being masculine or female; it pervades one's entire concept of one's place in life, of one's place in society and in point of fact the actual facts of the anatomy are really secondary." Id. The doctor said that after the operation his patient had no uterus or cervix, but her vagina had a "good cosmetic appearance" and was "the same as a normal female vagina after a hysterectomy." Id. at 206.

The trial court, in ruling for M.T. by finding the marriage valid, stated:

> It is the opinion of the court that if the psychological choice of a person is medically sound, not a mere whim, and irreversible sex reassignment surgery has been performed, society has no right to prohibit the transsexual from leading a normal life. Are we to look upon this person as an exhibit in a circus side show? What harm has said person done to society? The entire area of transsexualism is repugnant to the nature of many persons within our society. However, this should not govern the legal acceptance of a fact.

Id. at 207. The appellate court affirmed, holding:

> If such sex reassignment surgery is successful and the postoperative transsexual is, by virtue of medical treatment, thereby possessed of the full capacity to function sexually as male or

> female, as the case may be, we perceive no legal barrier, cognizable social taboo, or reason grounded in public policy to prevent the persons' identification at least for purposes of marriage to the sex finally indicated.

Id. at 210-11.

Ohio is the last state that has considered this issue. See In re Ladrach, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Ohio Probate Ct. 1987). Ladrach was a declaratory judgment action brought to determine whether a male who became a post-operative female was permitted to marry a male. Id. at 829-30. The court decided she may not. Id. at 832.

Like Christie, Elaine Ladrach started life as a male. Id. at 830. Eventually, she had the transsexual operation which removed the penis, scrotum and testes and constructed a vagina. Id. The doctor who performed the operation testified that Elaine now had a "normal female external genitalia." Id. He admitted, however, that it would be "highly unlikely" that a chromosomal test would show Elaine to be a female. Id. The court cited a New York Academy of Medicine study of transsexuals that concluded : "...male to female transsexuals are still chromosomally males while ostensibly females." Id. at 831. The court stated that a person's sex is determined at birth by an anatomical examination by the birth attendant, which was done at Elaine's birth. Id. at 832. No allegation had been made that Elaine's birth attendant was in error. Id. The court reasoned that the determination of a person's sex and marital status are legal issues, and, as such, the court must look to the statutes to determine whether the marriage was permissible. Id. The court concluded:

> This court is charged with the responsibility of interpreting the statutes of this state and judicial interpretations of these statutes. Since the case at bar is apparently one of first

> impression in Ohio, it is this court's opinion that the legislature should change the statutes, if it is to be the public policy of the state of Ohio to issue marriage licenses to post-operative transsexuals.

Id. The court denied the marriage license application. Id.

Other Authorities

In an unreported case, a court in New Zealand was convinced that a fully transitioned transsexual should be permitted to marry as a member of his new sex because the alternative would be more disturbing. See Mary Coombs, Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage, 8 UCLA Women's L.J. 219, 250 & n. 137 (1998) (citing M. v. M. (unreported) 30 May 1991, S. Ct. of NZ). That is, if a post-operative transsexual female was deemed a male, she could marry a woman, in what would to all outward appearances be a same-sex marriage. Id. The question would then become whether courts should approve seemingly heterosexual marriages between a post-operative transsexual female and a genetic male, rather than an apparent same-sex marriage between a post-operative transsexual female and a genetic female. Id.

The appellee cites K. v. Health Division of Human Resources, 560 P.2d 1070 (Or.1977), in his brief. That case dealt with whether a post-operative transsexual male could alter his birth certificate to change the designated gender. Id. The court held that the issue was a matter of public policy to be decided by the Oregon legislature. Id. at 376. The legislature did respond to the issue, and Oregon now has a statutory provision that enables a person whose sex has been changed by surgical procedure to amend his or her birth certificate. Or. Rev. Stat. § 432.235(4) (West 1999). Other states have similar statutory provisions or have interpreted their statutes to permit such an amendment to a birth certificate. See In re Ledrach, 513 N.E.2d at 832 (noting

fifteen states have permitted a post-operative change of sex designation on birth records).

Discussion

Christie challenges the trial court's summary judgment on four issues: (1) Prange did not carry his summary judgment burden of proving, as a matter of law, that Christie's marriage was between persons of the same sex; there is no summary judgment evidence that Christie was male at the time of her ceremonial marriage to Jonathon Littleton, the deceased; (2) Prange did not carry his burden of proving, as a matter of law, that Christie was male at the time of her ceremonial marriage to Jonathon Littleton, the deceased; sex at birth is not the test for determining the sex of a true post-operative transsexual for purposes of marriage; (3) Prange did not carry his summary judgment burden of proving, as a matter of law, that Christie's marriage is void; there is no summary judgment evidence that rebuts the presumption of validity of marriage; and (4) the summary judgment should be reversed because, at the very least, Christie produced summary judgment evidence raising a genuine issue of material fact that precludes summary judgment.

In an appeal from a summary judgment, we must determine whether the movant has shown that no genuine issue of material facts exists and that the movant is entitled to judgment as a matter of law. Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985); Ray v. O'Neal, 922 S.W.2d 314, 316 (Tex. App.--Fort Worth 1996, writ denied). In determining whether a material fact issue exists to preclude summary judgment, evidence favoring the nonmovant is taken as true, and all reasonable inferences are indulged in favor of the nonmovant. Nixon v. Mr. Property Management Co., 690 S.W.2d at 548-59. Furthermore, any doubt is resolved in the nonmovant's favor. Id.

As previously noted, this is a case of first impression in Texas. It involves important matters of public policy for

the state of Texas. The involvement of juries in the judicial process provides an important voice of the community, but we do not ask a jury to answer questions without appropriate instructions or guidelines. In fact, cases are reversed when juries have not been provided proper instructions.

In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals. The need for legislative guidelines is particularly important in this case, where the claim being asserted is statutorily-based. The statute defines who may bring the cause of action: a surviving spouse, and if the legislature intends to recognize transsexuals as surviving spouses, the statute needs to address the guidelines by which such recognition is governed. When or whether the legislature will choose to address this issue is not within the judiciary's control.

It would be intellectually possible for this court to write a protocol for when transsexuals would be recognized as having successfully changed their sex. Littleton has suggested we do so, perhaps using the surgical removal of the male genitalia as the test. As was pointed out by Littleton's counsel, "amputation is a pretty important step." Indeed it is. But this court has no authority to fashion a new law on transsexuals, or anything else. We cannot make law when no law exists: we can only interpret the written word of our sister branch of government, the legislature. Our responsibility in this case is to determine whether, in the absence of legislatively-established guidelines, a jury can be called upon to decide the legality of such marriages. We hold they cannot. In the absence of any guidelines, it would be improper to launch a jury forth on these untested and unknown waters.

There are no significant facts that need to be decided. The parties have supplied them for us. We find the case, at this stage, presents a pure question of law and must be decided by this court.

Based on the facts of this case, and the law and studies of previous cases, we conclude:

(1) Medical science recognizes that there are individuals whose sexual self-identity is in conflict with their biological and anatomical sex. Such people are termed transsexuals.

(2) A transsexual is not a homosexual in the traditional sense of the word, in that transsexuals believe and feel they are members of the opposite sex. Nor is a transsexual a transvestite. Transsexuals do not believe they are dressing in the opposite sex's clothes. They believe they are dressing in their own sex's clothes.

(3) Christie Littleton is a transsexual.

(4) Through surgery and hormones, a transsexual male can be made to look like a woman, including female genitalia and breasts. Transsexual medical treatment, however, does not create the internal sexual organs of a women (except for the vaginal canal). There is no womb, cervix or ovaries in the post-operative transsexual female.

(5) The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.

(6) The evidence fully supports that Christie Littleton, born male, wants and believes herself to be a woman. She has made every conceivable effort to make herself a female, including a

> surgery that would make most males pale and perspire to contemplate.
>
> (7) Some physicians would consider Christie a female; other physicians would consider her still a male. Her female anatomy, however, is all man-made. The body that Christie inhabits is a male body in all aspects other than what the physicians have supplied.

We recognize that there are many fine metaphysical arguments lurking about here involving desire and being, the essence of life and the power of mind over physics. But courts are wise not to wander too far into the misty fields of sociological philosophy. Matters of the heart do not always fit neatly within the narrowly defined perimeters of statutes, or even existing social mores. Such matters though are beyond this court's consideration. Our mandate is, as the court recognized in Ladrach, to interpret the statutes of the state and prior judicial decisions. This mandate is deceptively simplistic in this case: Texas statutes do not allow same-sex marriages, and prior judicial decisions are few.

Christie was created and born a male. Her original birth certificate, an official document of Texas, clearly so states. During the pendency of this suit, Christie amended the original birth certificate to change the sex and name. Under section 191.029 of the Texas Health and Safety Code she was entitled to seek such an amendment if the record was "incomplete or proved by satisfactory evidence to be inaccurate." Tex. Health & Safety Code Ann. § 191.029 (Vernon 1992). The trial court that granted the petition to amend the birth certificate necessarily construed the term "inaccurate" to relate to the present, and having been presented with the uncontroverted affidavit of an expert stating that Christie is a female, the trial court deemed this satisfactory to prove an inaccuracy. However, the trial court's

role in considering the petition was a ministerial one. It involved no fact-finding or consideration of the deeper public policy concerns presented. No one claims the information contained in Christie's original birth certificate was based on fraud or error. We believe the legislature intended the term "inaccurate" in section 191.028 to mean inaccurate as of the time the certificate was recorded; that is, at the time of birth. At the time of birth, Christie was a male, both anatomically and genetically. The facts contained in the original birth certificate were true and accurate, and the words contained in the amended certificate are not binding on this court. There are some things we cannot will into being. They just are.

Conclusion

We hold, as a matter of law, that Christie Littleton is a male. As a male, Christie cannot be married to another male. Her marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse.

We affirm the summary judgment granted by the trial court.

/s/PHIL HARDBERGER,
CHIEF JUSTICE

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Appendix C

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

CONCURRING OPINION

No. 04-99-00010-CV

Christie Lee LITTLETON, Individually and
as Next Heir of Jonathon Mark Littleton,
Appellant

v.

Dr. Mark PRANGE,
Appellee

From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 98-CI-15220
Honorable Frank Montalvo, Judge Presiding

Opinion by: Phil Hardberger, Chief Justice
Concurring opinion by: Karen Angelini, Justice
Dissenting opinion by: Alma L. López, Justice

Sitting: Phil Hardberger, Chief Justice
Alma L. López, Justice
Karen Angelini, Justice

Delivered and Filed: October 27, 1999

I concur in the judgment. Given the complete absence of any legislative guidelines for determining whether Texas law will recognize a marriage between a male-to-female transsexual and a male, this court is charged with making that determination. This case involves no disputed fact

issues for a jury to decide, but presents this court with pure issues of law and public policy.

In his opinion, Chief Justice Hardberger has concluded, based on an analysis of other cases considering this issue, that Texas law will not recognize Christie Lee Littleton's marriage to John Mark Littleton. In doing so, Chief Justice Hardberger notes his agreement with the Ladrach decision, which indicates that this is a matter best left to the legislature. He further notes, in accordance with the Corbett case, that because we lack statutory guidance at this time, we must instead be guided by biological factors such as chromosomes, gonads, and genitalia at birth. According to Chief Justice Hardberger, such biological considerations are preferable to psychological factors as tools for making the decision we must make. In this case, I must agree.

I note, however, that "real difficulties ... will occur if these three criteria [chromosomal, gonadal and genital tests] are not congruent." Corbett v. Corbett, 2 All E.R. 33, 48 (P.1970). We must recognize the fact that, even when biological factors are considered, there are those individuals whose sex may be ambiguous. See Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265 (1999). Having recognized this fact, I express no opinion as to how the law would view such individuals with regard to marriage. We are, however, not presented with such a case at this time. See Corbett, 2 All E.R. at 48-49.

The stipulated evidence in the case that is before us establishes that Christie Lee Littleton was born Lee Edward Cavazos, Jr., a male. Her doctors described her as a true transsexual, which is "someone whose physical anatomy does not correspond to their sense of being or their sense of gender...." Thus, in the case of Christie Lee Littleton, it appears that all biological and physical factors were congruent and were consistent with those of a typical male at birth. The only pre-operative distinction between Christie

Lee Littleton and a typical male was her psychological sense of being a female. Under these facts, I agree that Texas law will not recognize her marriage to a male.

/s/Karen Angelini, Justice

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Appendix C

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio

DISSENTING OPINION

No. 04-99-00010-CV

Christie Lee LITTLETON, Individually and
as Next Heir of Jonathon Mark Littleton,
Appellant

v.

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From the 288th Judicial District Court, Bexar County, Texas
Trial Court No. 98-CI-15220
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Opinion by: Phil Hardberger, Chief Justice
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Sitting: Phil Hardberger, Chief Justice
Alma L. López, Justice
Karen Angelini, Justice

Delivered and Filed: October 27, 1999

Although the standard for reviewing a trial court's order for summary judgment is well-settled in this state, that standard is not addressed in the majority's opinion. To prevail on a motion for summary judgment, the movant must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Nixon v.

Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). In the instant case, this standard required Dr. Prange to prove that Christie Littleton was not the surviving spouse of Jonathon Littleton. To disprove this element of the plaintiff's cause of action, Dr. Prange produced only Christie's original birth certificate. This evidence, the majority concludes, is enough to prove as a matter of law that Christie Littleton is a male and that, as a result, Christie is not Jonathon's surviving spouse.

While a birth certificate would ordinarily establish a person's gender conclusively, Christie presented significant controverting evidence that indicated she was female. This evidence was so substantial that it raised a genuine issue of material fact about whether she was Jonathon's surviving spouse. In an ordinary summary judgment case, such controverting evidence would prevent this court from concluding that the movant had met its burden on a motion for summary judgment. But in this rather extraordinary case, the majority has determined that there are no significant facts that need to be determined and concluded that Christie is a male as a matter of law. Despite this conclusion, there is no law to serve as the basis of this conclusion.

The absence of controlling law precludes a judgment as a matter of law in this case. Notably, neither federal nor state law defines how a person's gender is to be determined. Our state legislature has not determined the guidelines that should govern the recognition of marriages involving transsexuals. Particularly material to this case, the legislature has not addressed whether a transsexual is to be considered a surviving spouse under the Wrongful Death and Survival Statutes. In an ordinary case, the absence of such law would prevent this court from concluding that the movant was entitled to judgment as a matter of law. In the instant case, however, the majority relies on the absence of statutory law to conclude that this case presents a pure question of law that must be decided by this court rather than to allow the case to proceed to trial; that is, whether Christie is male or female.

On its surface, the question of whether a person is male or female seems simple enough. Complicated with the issues of surgical alteration, sexual identity, and same-sex marriage, the answer is not so simple. To answer the question, the majority assumes that gender is accurately determined at birth. Consider the basis for such a determination. Traditionally, an attending physician or mid-wife determines a newborn's gender at birth after a visual inspection of the newborn's genitalia. If the child has a penis, scrotum, and testicles, the attendant declares the child to be male. If the child does not have a penis, scrotum, and testicles, the attendant declares the child to be female. This declaration is then memorialized by a certificate of birth, without an examination of the child's chromosomes or an inquiry about how the child feels about its sexual identity. Despite this simplistic approach, the traditional method of determining gender does not always result in an accurate record of gender.

Texas law recognizes that inaccuracies occur in determining, or at least recording, gender. By permitting the amendment of an original birth certificate upon satisfactory evidence, Texas law allows these inaccuracies to be corrected. Tex. Health & Safety Code Ann. 191.029 (Vernon 1992). Indeed, Christie's gender was lawfully corrected by an amended birth certificate months before the trial court ruled on Dr. Prange's motion for summary judgment. Notably, the amended birth certificate reflects the original filing date of April 10, 1952, the original date of birth, and an issuance date of August, 14, 1998. Retention of the original filing date indicates that the amended birth certificate has been substituted for the original birth certificate in the same way an amended pleading is substituted for an original pleading in a civil lawsuit.

Under the rules of civil procedure, a document that has been replaced by an amended document is considered a nullity. Rule 65 provides that the substituted instrument takes

the place of the original. Tex. R. Civ. P. 65. Although neither a state statute nor case law address the specific effect of an amended birth certificate, many cases address the effect of an amended pleading. See Randle v. NCNB Texas Nat'l Bank, 812 S.W. 2d 381, 384 (Tex. App.--Dallas 1991, no writ) (striking of second amended pleading restored first amended pleading); Wu v. Walnut Equip. Leasing Co., 909 S.W. 2d 273, 278 (Tex. App.—Houston [14th Dist.] 1995) (unless substituted instrument is set aside, the instrument for which it is substituted is no longer considered part of the pleading), rev'd on other grounds, 920 S.W.2d 285 (Tex. 1996). Under this authority, an amended instrument changes the original and is substituted for the original. Although a birth certificate is not a legal pleading, the document is an official state document. Amendment of the state document is certainly analogous to an amended legal pleading. In this case, Christie's amended birth certificate replaced her original birth certificate. In effect, the amended birth certificate nullified the original birth certificate. As a result, summary judgment was issued based on a nullified document. How then can the majority conclude that Christie is a male? If Christie's evidence that she was female was satisfactory enough for the trial court to issue an order to amend her original birth certificate to change both her name and her gender, why is it not satisfactory enough to raise a genuine question of material fact on a motion for summary judgment?

Granted the issues raised by this case are best addressed by the legislature. In the absence of law addressing those issues, however, this court is bound to rely on the standard of review and the evidence presented by the parties. Here, the stipulated evidence alone raises a genuine question about whether Christie is Jonathon's surviving spouse. Every case need not be precedential. In this case, the court is required to determine as a matter of law whether Christie is Jonathon's surviving spouse, not to speculate on the legalities of public policies not yet addressed by our

legislature. Under a focused review of this case, a birth certificate reflecting the birth of a male child named Lee Cavazos does not prove that Christie Littleton is not the surviving spouse of Jonathan Littleton. Having failed to prove that Christie was not Jonathon's surviving spouse, Dr. Prange was not entitled to summary judgment. Because Christie's summary judgment evidence raises a genuine question of material fact about whether she is the surviving spouse of Jonathon Littleton, I respectfully dissent.

/s/Alma L. López, Justice

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